

Senate Bill No. 105

CHAPTER 620

An act to amend Section 6103.6 of the Business and Professions Code, and to amend Sections 2583, 15642, 16062, 21310, and 21355 of, and to add Part 3.7 (commencing with Section 21360) to Division 11 of, the Probate Code, relating to donative transfers.

[Approved by Governor September 30, 2010. Filed with
Secretary of State September 30, 2010.]

LEGISLATIVE COUNSEL'S DIGEST

SB 105, Harman. Donative transfers: restrictions.

Existing law generally prohibits an instrument from making a donative transfer to the person who drafted or transcribed the instrument and certain other disqualified persons. This provision is subject to specified exceptions, including when the instrument is reviewed by an independent attorney who counsels the client about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers to the transferor a certificate of independent review.

This bill would revise and recast these provisions to establish an express presumption of fraud or undue influence when a donative instrument makes a gift to the person who drafted or transcribed the instrument, and certain other disqualified persons. The bill would define relevant terms for purposes of these provisions and make other technical and conforming changes.

The people of the State of California do enact as follows:

SECTION 1. Section 6103.6 of the Business and Professions Code is amended to read:

6103.6. Violation of Section 15687 of the Probate Code, or of Part 3.5 (commencing with Section 21350) or Part 3.7 (commencing with Section 21360) of Division 11 of the Probate Code, shall be grounds for discipline, if the attorney knew or should have known of the facts leading to the violation. This section shall only apply to violations that occur on or after January 1, 1994.

SEC. 2. Section 2583 of the Probate Code is amended to read:

2583. In determining whether to authorize or require a proposed action under this article, the court shall take into consideration all the relevant circumstances, which may include, but are not limited to, the following:

(a) Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity.

(b) The past donative declarations, practices, and conduct of the conservatee.

(c) The traits of the conservatee.

(d) The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.

(e) The wishes of the conservatee.

(f) Any known estate plan of the conservatee (including, but not limited to, the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated).

(g) The manner in which the estate would devolve upon the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees.

(h) The value, liquidity, and productiveness of the estate.

(i) The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration.

(j) Changes of tax laws and other laws which would likely have motivated the conservatee to alter the conservatee's estate plan.

(k) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so.

(l) Whether any beneficiary is the spouse or domestic partner of the conservatee.

(m) Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or fiduciary abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment.

SEC. 3. Section 15642 of the Probate Code is amended to read:

15642. (a) A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 17200.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) Where the trustee's compensation is excessive under the circumstances.

(6) Where the sole trustee is a person described in subdivision (a) of Section 21350 or subdivision (a) of Section 21380, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:

(A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

(B) The instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of his or her intended trustee designation and (2) signs and delivers to the settlor and the designated trustee a certificate in substantially the following form:

“CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and have counseled my client,
(name of instrument)

_____, fully and privately on the nature and
(name of client)

legal effect of the designation as trustee of _____
(name of trustee)

contained in that instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and that intent is not the product of fraud or undue influence.

(Name of Attorney)

(Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited

to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(C) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(7) If, as determined under Part 17 (commencing with Section 810) of Division 2, the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office. When the trustee holds the power to revoke the trust, substantial inability to manage the trust's financial resources or otherwise execute properly the duties of the office may not be proved solely by isolated incidents of negligence or improvidence.

(8) If the trustee is substantially unable to resist fraud or undue influence. When the trustee holds the power to revoke the trust, substantial inability to resist fraud or undue influence may not be proved solely by isolated incidents of negligence or improvidence.

(9) For other good cause.

(c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees.

(d) If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees.

(e) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

(f) For purposes of this section, the term "related by blood or marriage" shall include persons within the seventh degree.

SEC. 4. Section 16062 of the Probate Code is amended to read:

16062. (a) Except as otherwise provided in this section and in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

(b) A trustee of a living trust created by an instrument executed before July 1, 1987, is not subject to the duty to account provided by subdivision (a).

(c) A trustee of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided by subdivision (a), except that

if the trust is removed from continuing court jurisdiction pursuant to Article 2 (commencing with Section 17350) of Chapter 4 of Part 5, the duty to account provided by subdivision (a) applies to the trustee.

(d) Except as provided in Section 16064, the duty of a trustee to account pursuant to former Section 1120.1a of the Probate Code (as repealed by Chapter 820 of the Statutes of 1986), under a trust created by a will executed before July 1, 1977, which has been removed from continuing court jurisdiction pursuant to former Section 1120.1a, continues to apply after July 1, 1987. The duty to account under former Section 1120.1a may be satisfied by furnishing an account that satisfies the requirements of Section 16063.

(e) Any limitation or waiver in a trust instrument of the obligation to account is against public policy and shall be void as to any sole trustee who is a disqualified person as defined in Section 21350.5 or who is described in subdivision (a) of Section 21380 and is not described in Section 21382.

SEC. 5. Section 21310 of the Probate Code is amended to read:

21310. As used in this part:

(a) “Contest” means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) “Direct contest” means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

- (1) Forgery.
- (2) Lack of due execution.
- (3) Lack of capacity.
- (4) Menace, duress, fraud, or undue influence.

(5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(6) Disqualification of a beneficiary under Section 6112, 21350, or 21380.

(c) “No contest clause” means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) “Pleading” means a petition, complaint, cross-complaint, objection, answer, response, or claim.

(e) “Protected instrument” means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

SEC. 6. Section 21355 of the Probate Code is amended to read:

21355. (a) This part shall apply to instruments that become irrevocable on or after September 1, 1993, and before January 1, 2011. For the purposes of this section, an instrument that is otherwise revocable or amendable shall

be deemed to be irrevocable if on or after September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.

(b) This part shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 7. Part 3.7 (commencing with Section 21360) is added to Division 11 of the Probate Code, to read:

PART 3.7. PRESUMPTION OF FRAUD OR UNDUE INFLUENCE

CHAPTER 1. DEFINITIONS

21360. The definitions in this chapter govern the construction of this part.

21362. (a) “Care custodian” means a person who provides health or social services to a dependent adult, except that “care custodian” does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult (1) at least 90 days before providing those services, (2) at least six months before the dependent adult’s death, and (3) before the dependant adult was admitted to hospice care, if the dependent adult was admitted to hospice care. As used in this subdivision, “remuneration” does not include the donative transfer at issue under this chapter or the reimbursement of expenses.

(b) For the purposes of this section, “health and social services” means services provided to a dependent adult because of the person’s dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.

21364. “Cohabitant” has the meaning provided in Section 13700 of the Penal Code.

21366. “Dependent adult” means a person who, at the time of executing the instrument at issue under this part, was a person described in either of the following:

(a) The person was 65 years of age or older and satisfied one or both of the following criteria:

(1) The person was unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.

(2) Due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811, the person had difficulty managing his or her own financial resources or resisting fraud or undue influence.

(b) The person was 18 years of age or older and satisfied one or both of the following criteria:

(1) The person was unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.

(2) Due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811, the person had substantial difficulty managing his or her own financial resources or resisting fraud or undue influence.

21368. “Domestic partner” has the meaning provided in Section 297 of the Family Code.

21370. “Independent attorney” means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this part, and who would not be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue under this part.

21374. (a) A person who is “related by blood or affinity” to a specified person means any of the following persons:

(1) A spouse or domestic partner of the specified person.

(2) A relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the specified person.

(3) The spouse or domestic partner of a person described in paragraph (2).

(b) For the purposes of this section, “spouse or domestic partner” includes a predeceased spouse or predeceased domestic partner.

(c) In determining a relationship under this section, Sections 6406 and 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6, are applicable.

CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION

21380. (a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

(1) The person who drafted the instrument.

(2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.

(4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

(5) A cohabitant or employee of any person described in paragraphs (1) to (3), inclusive.

(6) A partner, shareholder, or employee of a law firm in which a person described in paragraph (1) or (2) has an ownership interest.

(b) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by clear

and convincing evidence, that the donative transfer was not the product of fraud or undue influence.

(c) Notwithstanding subdivision (b), with respect to a donative transfer to the person who drafted the donative instrument, or to a person who is related to, or associated with, the drafter as described in paragraph (4), (5), or (6) of subdivision (a), the presumption created by this section is conclusive.

(d) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.

21382. Section 21380 does not apply to any of the following instruments or transfers:

(a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

(b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

(c) An instrument that is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4, after full disclosure of the relationships of the persons involved.

(d) A donative transfer to a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding the transferred property for the entity.

(e) A donative transfer of property valued at five thousand dollars (\$5,000) or less, if the total value of the transferor's estate equals or exceeds the amount stated in Section 13100.

(f) An instrument executed outside of California by a transferor who was not a resident of California when the instrument was executed.

21384. (a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate in substantially the following form:

“CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and have counseled the transferor,
(name of instrument)

_____, on the nature and consequences of any
(name of transferor)

transfers of property to _____

(name of person described in Section 21380 of the Probate Code)
that would be made by the instrument.

I am an “independent attorney” as defined in Section 21370 of the Probate Code and am in a position to advise the transferor independently, impartially, and confidentially as to the consequences of the transfer.

On the basis of this counsel, I conclude that the transfers to _____ that would
(name of person described in Section 21380 of the Probate Code)
be made by the instrument are not the product of fraud or undue influence.

(Name of Attorney) (Date)

(b) An attorney whose written engagement, signed by the transferor, is expressly limited solely to compliance with the requirements of this section, shall not be considered to otherwise represent the transferor as a client.

(c) An attorney who drafts an instrument can review and certify the same instrument pursuant to this section, but only as to a gift to a care custodian. In all other circumstances, an attorney who drafts an instrument may not review and certify the instrument.

(d) If the certificate is prepared by an attorney other than the attorney who drafted the instrument that is under review, a copy of the signed certification shall be provided to the drafting attorney.

21386. If a gift fails under this part, the instrument making the gift shall operate as if the beneficiary had predeceased the transferor without spouse, domestic partner, or issue.

21388. (a) A person is not liable for transferring property pursuant to an instrument that is subject to the presumption created under this part, unless the person is served with notice, prior to transferring the property, that the instrument has been contested under this part.

(b) A person who is served with notice that an instrument has been contested under this part is not liable for failing to transfer property pursuant to the instrument, unless the person is served with notice that the validity of the transfer has been conclusively determined by a court.

21390. This part applies notwithstanding a contrary provision in an instrument.

21392. (a) This part shall apply to instruments that become irrevocable on or after January 1, 2011. For the purposes of this section, an instrument that is otherwise revocable or amendable shall be deemed to be irrevocable if, on or after January 1, 2011, the transferor by reason of incapacity was unable to change the disposition of the transferor’s property and did not regain capacity before the date of the transferor’s death.

(b) It is the intent of the Legislature that this part supplement the common law on undue influence, without superseding or interfering in the operation of that law. Nothing in this part precludes an action to contest a donative

transfer under the common law or under any other applicable law. This subdivision is declarative of existing law.

O